

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PECO PALLET, INC., }
Plaintiff, }
-vs- } No. 15 C 6811
NORTHWEST PALLET SUPPLY CO., } Chicago, Illinois
Defendants. } May 10, 2016
10:30 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ANDREA R. WOOD

APPEARANCES:

For the Plaintiff: WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601
BY: MR. DANIEL D. RUBINSTEIN
MS. KATHRYN A. BAYER
MR. WILLIAM CHARLES O'NEIL

For the Defendant: TARPEY WIX LLC
225 West Wacker Drive
Chicago, Illinois 60606
BY: MR. DAVID G. WIX

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1 passed.

2 THE COURT: Okay. So Mr. Wix, did Allen County
3 indicate that they were going to file something, seek a
4 protective order, something along those lines?

5 MR. WIX: I had a voicemail this morning, your
6 Honor, I didn't have time to call them back. The voicemail
7 was that they wanted to -- they were aware of the fact that
8 we had filed a motion to quash and that they wanted to be a
9 part of that because they considered the documents being
10 requested in the subpoena to be confidential and proprietary
11 to them. But I haven't had that actual conversation.

12 THE COURT: Okay. Well, obviously I can't rule on
13 any objection that they don't actually come in and raise. So
14 on the issue of at least PECO's subpoenas, I don't at this
15 point have any record of any objection from a party, or at
16 least that's gotten to the level where they're seeking a
17 protective order.

18 I did have some of my own concerns about the scope
19 of the subpoenas. I don't recall if I touched on this last
20 time before we ended up continuing things to this hearing.
21 But the subpoenas, as I recall, requesting documents relating
22 to the third parties' relationships with other recyclers
23 other than Northwest, I think it was generally about any such
24 arrangements that they had in place. Let me see if I can
25 pull up my note. But that was my recollection.

1 Is that what PECO is seeking here, or is your
2 request intended to be just limited to the third parties'
3 business relationships with either PECO or Northwest?

4 MR. O'NEIL: We are limiting it to the latter.
5 Their business relationship with us or them. We're only
6 concerned with what these parties have done with our pallets
7 when they have come into possession with our pallets, how
8 much cost they are incurring to handle them, to stack, sort,
9 and load them, and how much -- what the economics are like
10 vis-à-vis them and Northwest.

11 This is very important to our damages, the damages
12 for both sides in this case. The central issue is these two
13 parties can't agree on what a fair price is to do the work,
14 the effort that they do when they get our pallets. And these
15 are the subcontractors that they've hired around the country.
16 This is a sampling of the subcontractors that handle our
17 pallets.

18 So Northwest has national contracts, with Target as
19 one example, but they don't have employees around the country
20 to handle those pallets themselves, so they have to
21 subcontract that work to other pallet recyclers throughout
22 the country. These are 11 pallet recyclers which they've
23 identified in their own Rule 26(a) disclosures as people
24 having knowledge about the case. So we've asked their
25 subcontractors: To the extent you come into contact with

1 PECO pallets, tell us about your correspondence with
2 Northwest about it and what the economics are of how much are
3 they paying you to do the stack, sort, and load, because
4 that's central to figuring out the key issue in this case,
5 which is what's the right price. Because that's really what
6 this case is largely coming down to, and what the parties
7 fundamentally, if you set aside all the causes of action,
8 can't agree on.

9 THE COURT: Am I correct, though, that the subpoena
10 would call for production of information relating to any
11 arrangement they have with a business partner other than
12 Northwest to recycle PECO pallets?

13 MR. O'NEIL: That's not our intention, your Honor,
14 and we're glad to -- I mean, we've made it clear to these
15 folks we're glad to work with them to narrow the burden.
16 We've issued seven requests. We are not trying to unfairly
17 burden these people or get into their business affairs. We
18 really want to know issues related to their business
19 relationship with Northwest and specifically their handling
20 of these red PECO pallets. Anything else they do we're not
21 concerned with getting into. So we will gladly constrict the
22 subpoena to those confines with these third parties.

23 THE COURT: Give me a moment here.

24 So I think the subpoena that was attached to the
25 motion to quash is directed to the Pallet Factory?

1 MR. O'NEIL: In fact, I have that one in my hand,
2 your Honor.

3 THE COURT: Okay. So --

4 MR. WIX: I believe they're all the same.

5 MR. O'NEIL: They are all the same.

6 THE COURT: They're all the same. Good. That
7 makes it simpler.

8 So for example, item No. 4 says: "All documents
9 and communications relating to any fees Pallet Factory may
10 have paid to Northwest, any retailer, or any other party as
11 it relates to PECO pallets."

12 So I guess my question is for these requests that
13 refer to any retailer or any other parties, is that intended
14 to capture if they had a relationship with somebody other
15 than Northwest or performed the same services, are you asking
16 them to provide that information, or only with Northwest?

17 MR. O'NEIL: Northwest. And the retailer is not
18 Northwest. The retailer is Target, in my hypothetical
19 example. Because what we've learned in this case or have
20 been told by Northwest is that they're sometimes paying
21 concession fees to get our pallets. So to get our red
22 pallets they're paying -- I'll give you 10 cents, 20 cents in
23 issue to get the pallet, and then they're doing their labor
24 on top of it.

25 So part of their damages they're claiming in this

1 case is not just the actual effort of stack, sort, and load
2 our pallet, but also this concession fee they're basically
3 paying to buy our property and get the opportunity to handle
4 it and sell it -- in their mind sell it back to us, in our
5 mind return our property to us.

6 So part of their damages is that concession fee,
7 and so we're trying to get to the financial economics of if
8 that subcontractor is paying concession to Target to get
9 their hands on the red pallets in the first place, we want to
10 make sure we know what that is so that we can fairly account
11 for that in our damage model if we need to.

12 THE COURT: So the Pallet Factory here is the
13 subcontractor then that is contracting with Northwest to
14 collect pallets from the retailers, and then the pallets go
15 to Northwest, and Northwest ideally would be returning them
16 to PECO at some amount of money, and that's what you're
17 fighting about?

18 MR. O'NEIL: That pretty fairly represents it. So
19 Northwest goes out, and I'll let Mr. Wix comment to his -- to
20 his client's relationship. As I understand it, they go out
21 and sign a national contract with Target and say, we'll
22 handle all your distribution centers, pallets that come to
23 those distribution centers. But they don't have the manpower
24 to service that themselves on a nation-wide basis. They
25 subcontract it out.

1 The Pallet Factory is one of those subcontractor
2 vendors with them that come into contact with our pallets.
3 So there is some revenue share between Northwest and the
4 Pallet Factory as to there is an economic arrangement there
5 as to how much they're getting paid and how much Target is
6 getting paid for this whole thing, and we just want
7 transparency as to what that economic arrangement is for all
8 three of those parties so that we can build a damages model
9 that fairly accounts for the effort.

10 THE COURT: Would the Pallet Factory also work as a
11 subcontractor for some other companies, and would they also
12 do their own work on their own, collect pallets for their own
13 benefit not because they have a contract relationship with
14 Northwest?

15 MR. WIX: That's certainly my understanding, is
16 these independent contractors that Northwest Pallet enters
17 into agreements with are not solely doing the work just for
18 Northwest Pallet. They have their own businesses. I don't
19 know, they may very well have other arrangements with other
20 pallet recyclers to clear their docks in a certain particular
21 area, I don't know about that, but they certainly -- my
22 understanding is I don't think any of these recyclers have
23 100 percent of their business, which is independent
24 contracting and the work that they've agreed to do for
25 Northwest Pallet.

1 So I think, your Honor, part of our motion is that
2 these requests go way beyond anything that even arguably
3 could be related to Northwest Pallet, because it's asking for
4 any PECO Pallet or any arrangement that they have with any
5 retailer that, in our view, goes above and beyond what the
6 case is about.

7 And then quite frankly, as pointed out in our
8 motion, PECO's damages in this case relate to conversion, and
9 so everything that Mr. O'Neil is talking about about the
10 pricing relationship between Northwest Pallet and companies
11 like Pallet Recycler have nothing to do with whether
12 Northwest Pallet converted any pallets.

13 THE COURT: What about Northwest's claims in the
14 other suit?

15 MR. WIX: Our claim is for unjust enrichment, which
16 the measurement of damages which is the value of the pallet
17 returned to PECO, not any of the costs associated with
18 Northwest Pallet in getting that pallet back to PECO. The
19 measure of unjust enrichment damages is the value conferred
20 on the recipient of that service. So in this case it would
21 be what is the value of having a pallet that is otherwise not
22 in your possession and, in our opinion, lost or abandoned in
23 the marketplace returned to you so that you can then use it,
24 and rent it multiple times over the course of that pallet's
25 life. And those are the issues and the information that we

1 need to get in order to proceed with our claim of unjust
2 enrichment, is what the value is to them. Not what it might
3 cost us to get it back to them.

4 THE COURT: Also for I guess the promissory
5 estoppel claim or some of the other claims, isn't part of
6 your damages model dependent on coming up with a fair
7 compensation for your services? I understand you think the
8 fair compensation is what's in the agreement that sets out,
9 you know, what they had agreed to pay, but isn't there an
10 argument to be made that you need to figure out what it
11 really is in order to get to your damages for your claims?

12 MR. WIX: I don't believe so, because our
13 promissory estoppel claims are based upon the promises made
14 by PECO, PECO, to pay us a certain --

15 THE COURT: Is it peak-oh or peck-oh, by the way?

16 MR. WIX: We say peak-oh in our office, but I hear
17 them say peck-oh.

18 MR. O'NEIL: Phonetically it's P-A-Y-C-O.

19 MR. WIX: PECO, I apologize.

20 THE COURT: I was saying peak-oh, and I heard
21 peck-oh, so I switched.

22 MR. WIX: Our promissory estoppel claims are based
23 upon the promises that they made to us of a certain amount
24 that they would pay for the return of pallets. So for
25 instance, from January of 2015 until May 12, 2015 when PECO

1 sent us the letter saying we're no longer going to pay you,
2 they had previously promised to pay anywhere from \$1.25 or
3 \$1.95 per pallet, depending upon where it came from, for the
4 return of those pallets.

5 And during those three months -- four, four and a
6 half months, Northwest Pallet returned a number of pallets.
7 So part of our promissory estoppel claim is we're entitled to
8 the amount you promised us, because based upon that promise
9 we went out and gathered those pallets and returned them to
10 you.

11 So the only thing that we need to determine is
12 whether we acted reasonably on reliance on their promise for
13 a certain amount. We don't need any information from anybody
14 else to determine what that amount should be. The amount is
15 based on what they unequivocally promised to pay us to do
16 that for.

17 THE COURT: So your unjust enrichment claim you're
18 saying similarly doesn't require any independent assessment
19 of the value of the service of returning the pallets?

20 MR. WIX: Well, our position is the value of the
21 benefit conferred on PECO. So what the value of having a
22 pallet returned to them is to them.

23 Now, our position on that is what it actually costs
24 us to get the pallets back to them is not necessarily
25 indicative of what the value is to them. If it only costs us

1 hypothetically ten cents a pallet to get it back to them, but
2 they're going to re-rent that pallet for \$5.25, and they're
3 going to do that multiple times per year, the value to them
4 of having that pallet back is far greater than what our cost
5 is. And that is what the measure of unjust enrichment is,
6 the damages under an unjust enrichment theory is the value
7 conferred on the recipient. So our position is that that's
8 the kind of information that we need to be uncovering in
9 discovery versus what our actual costs are in doing it.

10 MR. O'NEIL: Your Honor, we strongly disagree that
11 that's the right measure of damages and that's the right
12 legal theory under which to measure the damages.

13 THE COURT: Under their case or your case?

14 MR. O'NEIL: Under their case and our case. So we
15 have a bailment claim. And under bailment law, the theory of
16 damages is the exact opposite of what Mr. Wix articulated,
17 and it is the actual cost of the services that have been
18 provided, not the value conferred upon us. So we think
19 that's the right measure of damages, and what I think you've
20 seen here is a preview of what is probably coming in
21 competing expert reports about different theories. But we're
22 in discovery, and what Mr. Wix would like to do is prevent me
23 from getting discovery about my theory of damages in this
24 case and the appropriate measure of damages so I can't even
25 put in that measure in a report in the case.

1 So if you think about it in a very simple
2 hypothetical as Northwest Pallet being a tow truck driver,
3 and they're towing a BMW. The BMW costs \$50,000. Under his
4 theory of damages the fee for the tow job would be well, the
5 car is worth 50,000 to you, so my fee can be 50,000. That's
6 his theory. And my theory is it costs \$185 for a tow truck
7 job across the street, and that's the right measure of
8 damages for that effort. That is really a point of
9 divergence intellectually and legally between these parties,
10 but at the discovery stage we should be entitled to take
11 discovery on the basic factual underpinnings of our competing
12 theories of damages, and we can present these to the Court
13 and maybe there will be motions in limine at some other
14 stage, but this at the discovery stage is not the right point
15 in time I think for us to say that you can't even have
16 discovery related to your theory of damages in the case that
17 is sound under the case law.

18 THE COURT: So I am going to permit some third
19 party discovery on these issues, and what I'm trying to
20 establish is perhaps some sort of limit or outer boundary to
21 the scope of that discovery.

22 It does seem to me that Northwest would have
23 standing to object to the subpoena based on the fact that
24 these are going to the heart of its business relationship
25 with third parties which could potentially damage those third

1 parties and therefore there is a direct interest that
2 Northwest is seeking to protect. That said, this information
3 strikes me as highly probative to some extent to the
4 substance of the case.

5 So while I think Northwest has standing to move to
6 quash the subpoena, I'm not going to quash the subpoena. And
7 what I'm struggling with a little bit, and I'll ask the
8 parties to provide input on, is to the extent I'm concerned
9 about the third parties having to disclose information about
10 business practices and relationships that do not have to do
11 with Northwest's arrangement for collecting pallets,
12 including PECO pallets, and then returning those to PECO,
13 does that go beyond the scope of what should be permitted, is
14 that something that potentially is invasive of proprietary
15 interests of those third parties because it's getting into
16 separate business relationships.

17 And then second, even if that's the case, those
18 third parties aren't here objecting. So while I do think
19 Northwest has standing to be concerned about its own business
20 relationships with these third parties, if the third parties
21 aren't complaining about this stuff off to the side that's
22 not directly related to Northwest, maybe that's not of
23 sufficient interest for Northwest to be objecting to it.

24 So let me start by, I guess, asking on the PECO
25 side: First, are you confirming that you do, in fact, want

1 information from these subcontractors about their
2 arrangements to the extent they involve PECO pallets, even if
3 Northwest is not a party to the arrangement?

4 MR. O'NEIL: So I think it is relevant to the
5 damages in terms of what their fee is to do that work, that
6 --

7 THE COURT: You want to know what the market rate
8 is.

9 MR. O'NEIL: I want to know what the market rate
10 is. But I would be willing to get at that information in a
11 very narrow tailored way that is not burdensome to these
12 third parties. Like I don't have to get into email
13 correspondence between them and another partner beside
14 Northwest, I would just need a sort of report, documents
15 sufficient to show rather than all documents related to the
16 subject. If they could just give us a report saying here's
17 what the economics of the labor looks like for this in a
18 spreadsheet, it could be perhaps as narrow as one document.

19 We're not seeking to get into the inner workings or
20 the interplay of the communications in their business
21 relationship with anyone else. We just want to know what the
22 market looks like for the stack, sort, and load effort.

23 THE COURT: Are you planning to issue 30(b)(6)
24 notices to any of these subcontractors?

25 MR. O'NEIL: We may have to, but I hope not to. I

1 think we're going to start with the first party discovery and
2 see what information we can get. We may do a 30(b)(6) to
3 Northwest Pallet, and we would only do that if we felt like
4 we needed to, and we would not do it in a blanket fashion to
5 all eleven of these people. We would try to be strategic
6 based on document production and maybe do one and see if we
7 need to do any more. But that's not our intention with doing
8 this, is to invoke a significant number of third-party
9 discovery.

10 We've sent these eleven folks a letter after we saw
11 you last that said, you know, Judge Wood is holding a hearing
12 on the 10th, if you want to object here's the address, please
13 come, and you have an opportunity to be heard.

14 We can send them another letter today clarifying
15 what we're seeking for in this consistent with the Court's
16 direction and concern on this particular issue. We can
17 basically offer to constrain the boundaries of what we're
18 looking for in a more narrow way in light of the Court's
19 guidance, and we can do that and get that to them via Federal
20 Express right away.

21 THE COURT: Well, I think the issue is what you're
22 asking them to do, which is to create a spreadsheet that
23 summarizes all of this information. I'm not sure that there
24 is a good mechanism under the federal rules for them to have
25 to do that, except for having to sit for a deposition.

1 Because for a document request, they could certainly object
2 to having to create a document.

3 MR. O'NEIL: I should be clear. I was asking for a
4 report that could be run in the ordinary course of the
5 business or that exists in the ordinary course of the
6 business, not that they create some new document that's never
7 before existed. But if they have -- maybe it's just a
8 financial statement, a quarterly financial statement that has
9 that information; they can redact the other things. We would
10 work with them to try to get that one piece that is not
11 related to Northwest.

12 And I don't think it's that -- I think we may be
13 concerned about something that's not -- a non-issue. I don't
14 think these recyclers are working with other parties to
15 handle PECO pallets, because PECO would be pretty cognizant
16 of that I think if these people were getting their hands on
17 their pallets through some other stream of commerce. I think
18 we would already kind of know about that. So I think the
19 concern is well-founded, but I think factually may not be
20 very prevalent.

21 THE COURT: Mr. Wix, let's assume that I'm going to
22 allow discovery relating to the subcontractors' relationship
23 with Northwest and the collection of those pallets and what
24 that arrangement is. Should I be concerned about the more
25 expansive category that I just described?

1 MR. WIX: Well, I think so, for largely the same
2 point that we've raised before, because at the end of the day
3 these pallet recyclers, just like Northwest Pallet, is a
4 competitor of PECO Pallet. They're renting pallets out in
5 the marketplace, pallet recyclers are getting white wood
6 pallets, repairing them, recycling them, and selling them out
7 in the marketplace, too, and they're both competing for the
8 same business with manufacturers, and producers, and anybody
9 who is shipping product for the business to use their
10 pallets.

11 So for them to -- it's one thing -- I won't belabor
12 the point on why I don't think it's relevant to damages
13 because you've ruled on that -- but it's one thing to say all
14 right, I'm going to allow PECO to get information related to
15 Northwest, which we can, you know, mark as confidential, or
16 attorneys' eyes only under the protective order, it's another
17 thing to then go to these third parties and say we don't --
18 we not only want your information on how you do business with
19 Northwest Pallet, we want all your information on how you do
20 business, when they are, in fact, at the end of the day
21 competitors in the same business of supplying pallets to
22 entities that ship product. So I think there is a concern
23 that the Court should be cognizant of.

24 THE COURT: And is PECO actually seeking all
25 communications between Northwest and subcontractors about the

1 arrangements, or are you actually expecting the
2 subcontractors to run email searches to try to get every
3 email back and forth?

4 I don't know if this is an industry where there is
5 a lot of email traffic about these arrangements or if you
6 sign an agreement, enter into an arrangement, and then it's
7 sort of self-effectuating, you don't need to correspond very
8 much.

9 MR. O'NEIL: So from the few people we have heard
10 from that have contacted us, they have said they have none or
11 almost no emails. So I don't think this is a heavy email
12 thing. If a particular -- one of these respondents came and
13 said look, that's very burdensome, we have a lot of emails, I
14 think we would limit the search terms to perhaps Northwest
15 Pallet, or NWP, or the ampersand Northwest Pallet.Com email
16 post fix, or something like that.

17 Again, we are not -- we envision the document
18 productions from these eleven people to be thin. I'm not
19 expecting to see more than 500 pages or a thousand pages from
20 these people. If someone came and said look, I've got a
21 hundred thousand pages, we would gladly work with them to
22 narrow the universe down. I do not think these are
23 significantly large productions that we're asking for.

24 THE COURT: Are you expecting to see a written
25 contract that breaks down the compensation that's going to go

1 to the subcontractor versus the compensation that's going to
2 Northwest?

3 MR. O'NEIL: I am expecting to see that, and that's
4 something that we've asked for from Northwest. And we have a
5 motion to compel that maybe we'll get to later today, but
6 that's a piece of that as well. But that's something we
7 would like, whether it's from the third party or from
8 Northwest. But there is a business arrangement that should
9 specify the economics, we believe, and we would like that
10 document.

11 THE COURT: Okay. So one more question about the
12 scope of PECO's subpoena. I think it goes back to January of
13 2013. That I think -- let's see. When did the Asset
14 Recovery Program come into effect?

15 MR. O'NEIL: That's been going for many years. We
16 used January of 2013 because that's the date that we agreed
17 to with Northwest for both directions on our ESI protocol.

18 THE COURT: I see. So it's to be consistent with
19 other discovery in the case?

20 MR. O'NEIL: Yes.

21 MR. WIX: Although I would -- sorry to interrupt --
22 I would point out there are different categories of documents
23 where we have agreed to a not lengthy -- not as lengthy a
24 time period. There are some categories where we've agreed we
25 only need to go back to January 1st, 2015, for instance.

1 And I would point out that the initial motion to
2 quash of the first two subpoenas that PECO filed back in
3 November and then we filed a motion to quash those in
4 December, those subpoenas only went back to January 1, 2014.
5 So while I agree with Mr. O'Neil that that was a time
6 parameter that was part of our ESI protocol, it certainly
7 isn't written in stone based upon what we've done in this
8 case.

9 MR. O'NEIL: Again, we would be flexible. If one
10 of these eleven people called us up and said look, we think
11 that's a lot of information, can we constrict the time
12 period, we would say of course, we'll work with you.

13 We believe that's the relevant time period, but if
14 -- we would prefer to resolve this amicably without taking
15 the Court's time. And if we had to take some time off for
16 that with a particular recycler because they had a lot of
17 volume, we would gladly do that.

18 THE COURT: Okay. For the contracts, assuming they
19 exist, that show the breakdown in the compensation, is that
20 something that Northwest would be seeking to designate as
21 attorneys' eyes only because you wouldn't want the business
22 people at PECO to know the exact breakdown?

23 MR. WIX: Correct.

24 MR. O'NEIL: And we have no issue with that, your
25 Honor.

1 THE COURT: Okay. So again, based on not having
2 any motion for protective order that's been presented by any
3 of the third parties, and just on the briefing that PECO and
4 Northwest have submitted on the motion to quash and our
5 argument in court, I'm inclined to deny the motion to quash
6 but impose some restrictions with respect to the third-party
7 productions just to make it a little more manageable, a
8 little less invasive to the third parties, and a little more
9 clearly relevant and probative so that the third parties --
10 so that PECO may seek from the third parties generally the
11 documents that are called for by the subpoena as they relate
12 to the third parties' relationship with Northwest to collect,
13 store, or return the PECO pallets, and those materials should
14 be provided to Northwest so they have an opportunity to
15 determine whether they should be designated as confidential
16 or attorneys' eyes only subject to the protective order.

17 Are the third parties being given an opportunity as
18 well to designate under the protective order?

19 MR. O'NEIL: That would be available to them under
20 the protective order.

21 MR. WIX: I know one of -- Mobile Pallet I think
22 responded and marked everything attorneys' eyes only. So I
23 know they were all provided with a copy of the protective
24 order when the subpoena was served, as were all of the
25 recipients of the subpoenas that were issued by Northwest

1 Pallet.

2 I don't know -- again, I can't speak for
3 Mr. O'Neil -- I know one of the pallet recyclers who I think
4 might have responded, I don't remember which one, but
5 certainly raised an issue whether the protective order in
6 this case truly applies to the third parties since they
7 aren't a party to the protective order. Oh, actually, you
8 know what? That was one of the recipients of our subpoenas
9 who was making that objection to me, and I think we're going
10 to work it out, but I just raise that.

11 THE COURT: I would think the parties could work
12 out an addendum to the protective order to make it clear and
13 give comfort to third parties that they would have ability to
14 designate under the order as well.

15 MR. WIX: Right. And that's what I discussed with
16 the attorney for one of the recipients of our subpoenas.

17 THE COURT: So for the documents, I'll say
18 information that would go beyond the subcontractors'
19 relationship with Northwest to whatever activities they might
20 be doing on their own or with other business partners, how
21 would you propose to limit the description? Documents
22 sufficient to show what? What is the spreadsheet that you
23 think can be created in the ordinary course?

24 MR. O'NEIL: Sure. Let me take a shot at trying to
25 narrow it down. Documents sufficient to show your cost to

1 stack, sort, and load PECO pallets, and the amount which you
2 charge to stack, sort, and load PECO pallets.

3 THE COURT: Do you expect that there will be other
4 subcontractors or third parties from which you'll be seeking
5 this information?

6 MR. O'NEIL: I don't think so. We tried to pick a
7 list of these eleven folks based on the discovery we saw from
8 Northwest Pallet, and we don't intend at this point to serve
9 any more third-party subpoenas on any of their other
10 recycling partners or subcontractors.

11 THE COURT: Mr. Wix, would you concur that this
12 sort of spreadsheet or report is something that the third
13 parties should be able to generate in the ordinary course of
14 their business? Would you expect that?

15 MR. WIX: That I don't know, your Honor.

16 THE COURT: Would Northwest be able to do it?

17 MR. WIX: I would think that they may be able to
18 show something that what their present costs and/or charges
19 are; to the extent going back to 2013, I don't know. But,
20 you know, I would think, yeah, Northwest Pallet would be able
21 to, I believe -- well, there is a lot of different factors
22 that go into it, and I don't know whether these recyclers
23 necessarily put all of it together to determine what the true
24 cost really is of stacking, sorting, and loading a pallet in
25 terms of transportation, mileage, gas, labor, worker's comp,

1 all those different categories which they may have individual
2 knowledge of, whether they put it all together, not to
3 mention -- well, this gets into damages theories that I'm
4 sure you'll hear a lot about with the experts, but the whole
5 idea of the lost cost opportunity to the pallet recyclers by
6 having to have space in their trailers taken up by PECO
7 pallets versus white wood pallets, which is where they're
8 really making their living and earning their income.

9 But to answer your question, I would think so. I
10 just don't know the extent.

11 THE COURT: You say the third parties are really
12 making their income from the white wood pallets and not the
13 PECO pallets? PECO pallets?

14 MR. WIX: I think that the pallet recyclers at the
15 core of their business is the recycling and resale of white
16 wood pallets. Obviously I don't know what their
17 relationships are outside of Northwest Pallet, so maybe they
18 have different relationships with respect to this stacking,
19 sorting, collecting, and transportation of PECO pallets from
20 other sources that is making them a lot of money and it's a
21 more significant part of their revenue than I'm aware of. So
22 I suppose I should retract that statement a little bit
23 because I don't know the extent of what their relationship is
24 with other people beyond Northwest Pallet as it pertains to
25 the collection and return of PECO pallets.

1 THE COURT: Okay. So is -- at least for present
2 purposes is Northwest comfortable then with the limitation
3 for third parties that they can satisfy the subpoena by --
4 with respect to the non-Northwest-related arrangements with
5 documents sufficient to show the cost to stack, sort, and
6 load PECO pallets and the amount that they charge to stack,
7 sort, and load PECO pallets?

8 MR. WIX: You said Northwest --

9 THE COURT: I'm sorry. PECO.

10 MR. O'NEIL: We're fine with that limitation of
11 documents sufficient to show, and to the extent they don't
12 have such documents, then they obviously can't produce those
13 to us and maybe we'll have to take a deposition in that
14 instance. But I don't know whether they track this, but if
15 they do, I would think most businesses track whether they're
16 profitable, what their costs are and what their profit margin
17 is, but if for some reason they don't, they can tell us that,
18 and we'll work with them to find some other solution and
19 we'll move on.

20 THE COURT: I assume that Northwest would maintain
21 your objection even to that more narrowly-drawn category of
22 documents, you would still be seeking to quash those
23 categories?

24 MR. WIX: We would.

25 THE COURT: Fair enough. So I'm inclined to allow

1 the subpoena to stand with that restriction that the third
2 parties will be able to satisfy the non-Northwest portion of
3 the production as I just described on the record, and again,
4 my position at this point is based in part on the fact that I
5 haven't heard from any third party coming in saying wait a
6 minute, this is burdensome, or it's getting into my other
7 business relationships, and it's a problem and it's an issue
8 for me.

9 If there is a third party that wants to raise it, I
10 would say this ruling, which is on Northwest's motion to
11 quash, would be without prejudice to those third parties
12 coming in and making an objection. It's possible that they
13 might have waived it at this point if their time for
14 objecting is passed or whatever the situation is, but knowing
15 that certain of these third parties have been in
16 communications with PECO, and maybe Northwest as well, I
17 think I'm going to leave the door open for them to at least
18 make an argument even if ultimately I find it's untimely,
19 because to me there is some difference between Northwest,
20 which is not just a defendant in this overall litigation but
21 also a plaintiff, and so to some extent Northwest is also
22 responsible for the fact that there is -- to some extent,
23 that there is going to be discovery on the issue of how this
24 industry is working and functioning and how costs are
25 allocated. So I think an objection from a third party would

1 carry more weight with me with respect to the scope of the
2 subpoena, the burdensomeness of it at this point.

3 So Mr. Wix, I did give you some limitation, so you
4 can feel you got something for your client and its business
5 partners.

6 My expectation is that a lot of the actual detailed
7 cost information would be appropriate for at least
8 confidential designation and probably attorneys' eyes only if
9 there are details of the business relationship that, you
10 know, perhaps could be used by business people at PECO, for
11 example, in the future and their pricing models.

12 I take it there have been -- there are no efforts
13 by PECO to quash Northwest's subpoenas, and I haven't seen
14 any protective order come in from third parties to Northwest
15 subpoenas, so there is nothing for me to decide on that.

16 MR. O'NEIL: That's correct, your Honor.

17 MR. WIX: There is nothing to decide, your Honor.
18 I think we're in the same boat, that there's a couple we
19 haven't heard from, so perhaps there might be a motion to
20 compel at some point, but not at the moment.

21 THE COURT: Good. So let's talk about the motion
22 to compel that was filed previously. Have the parties made
23 any progress on your own in trying to get information
24 exchanged?

25 MR. O'NEIL: I think we made some progress, your